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**THE RELATIONSHIP BETWEEN PUBLIC
INTERNATIONAL LAW AND MUNICIPAL LAW
IN BRITISH PRACTICE**

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BRITISH PRACTICE

1. Introduction

Scholarly commentators on the relationship between public international law and municipal law have a general tendency to commence their commentary by an examination of the theoretical and philosophical aspects of the subject: the apparently endless debate between those who support the monist and dualist doctrines or the more recent realist and harmonisation theories¹. I do not propose to do this. While English legal scholars by no means reject theory and philosophy, our traditional approach to law as a practical subject naturally leads us to focus initially on the evidence of what actually happens as a matter of practice, principally of course in the case law of our courts. Indeed, as far as the relationship between public international law and municipal law is concerned, I would suggest that it is primarily a matter of major practical significance. It is also a matter which is potentially beset by serious problems. The problems are apt to arise from the simple fact that although the international obligations of states are determined by the rules of public international law, the authority and jurisdiction of state officials who may be called upon to ensure that a state honours its international obligations are determined by the municipal laws of the state. In many states there are constitutional provisions concerned with this relationship which, with varying degrees of success, avoid or ease the problem. An outstanding example of this constitutional approach is, of course, Article 25 of the Constitution of the Federal Republic of Germany which not only makes the general rules of public international law an integral part of federal law but also declares that they shall take precedence over German law and directly create rights and duties

1 For discussion of these doctrines and theories, see O'Connell, *International Law* (2nd ed., 1970), Chapter 2, and Brownlie, *Principles of Public International Law* (3rd ed., 1979), Chapter 2.

for individuals. Such an apparently clear solution to the problem of reconciling international obligations with national autonomy is not however possible for the United Kingdom. The lack of clarity in British law on this point derives from the constitutional principle that there are no legal limits on the capacity of the United Kingdom Parliament to make law. But despite this basic British constitutional principle I hope to be able to demonstrate that in practice there is generally no real difficulty over the international obligations of the United Kingdom being honoured and enforced by our municipal courts. There are therefore a number of practical questions which I would like to consider:

- (i) By what means and to what extent is public international law applied by British courts?
- (ii) Is public international law applied automatically or is its application dependent on some legislative procedure?
- (iii) Do rules of public international law have precedence in British courts if they conflict with rules of municipal law?

There is not one set of answers to those questions because British practice makes a clear distinction between customary rules of public international law on the one hand, and rules laid down by treaties on the other.

2. Customary rules

British practice with regard to customary rules of public international law is basically that such rules are part of the law of the United Kingdom and will be applied as such by the courts. This practice does not rest on any particular constitutional principle but is purely a matter of common law, that is to say it has been made by the judges in deciding particular cases. The practice can be traced back to two decisions of English courts in the eighteenth century both of which involved issues of diplomatic immunity and have what might be called

"German connections". In the first, decided in 1737², a commercial agent commissioned by the King of Prussia was held not to be liable for a breach of English law because he was entitled to immunity under international law and, as the court put it, "the law of nations in its fullest extent is and forms part of the law of England". That was followed by the second case in 1764³ when on the same grounds a domestic servant of the Bavarian Minister to Great Britain also successfully claimed immunity. Since that time, subject to some qualifications to which I shall return, British courts have regularly followed this practice.

A clear illustration of the way in which the rule that customary international law is part of the law of the United Kingdom operates in practice is a case decided in the middle of the last century⁴. Kossuth, the Hungarian nationalist leader, contracted with a firm of English printers for them to produce a large quantity of counterfeit Hungarian bank notes. Kossuth was opposed to the Emperor of Austria's assumption of the title of King of Hungary and he proposed to use the counterfeit bank notes in his campaign against Austrian rule. The Emperor of Austria brought proceedings in an English court to restrain both Kossuth and the printers. It was argued by those defendants that the English courts had no jurisdiction over such a matter since it concerned the political affairs of a foreign state. But the court rejected that argument. It held that the regulation of its coin and currency by each state is a matter recognised and protected by the customary rules of international law. Therefore, as the judge put it: "A public right, recognised by the law of nations, is a legal right because the law of nations is part of the common law of England". An action therefore lay in the English courts to enforce such a right.

2 Buvot v. Barbuit, Cases t. Talbot 281.

3 Triquet v. Bath, 3 Burr. 1478.

4 Emperor of Austria v. Day & Kossuth, (1861) 2 Giff. 628.

Customary international law is thus not regarded as foreign law by British judges, but as part of British law itself they are presumed to know it. But problems can arise, and it is not always easy for British judges to discover what are the rules of customary law on a particular subject. Public international law is not a subject about which most British lawyers are very well informed. Since customary rules are regarded as part of the common law British lawyers tend to look for evidence of customary law in the judicial decisions of British courts and this can give rise to difficulties of two types. Firstly, there may be not sufficient evidence in such sources which could lead the British court to reach the wrong conclusion. An example is provided by a case decided in 1876⁵. A German ship had collided with a British ship at a point within three miles off the English coast. A passenger on the British ship died as a result of the collision. The captain of the German ship was charged with homicide before an English court. The question arose whether the English court had jurisdiction. It was put to the court that since the collision occurred within British territorial waters, the English court had jurisdiction by virtue of a rule of customary international law. But the English court found the evidence for the existence of such a rule inconclusive and held that it did not have jurisdiction by virtue of either customary international law or English law. It therefore erroneously regarded territorial waters as part of the high seas for jurisdictional purposes and applied a rule of customary international law about which it was convinced, namely that on board a foreign ship on the high seas the law of the foreign ship, i.e. in this case German law, applies⁶.

The second difficulty arises from the nature of the decisions of English courts as a source of the common law and the operation of the English doctrine of precedent. The recorded decisions of courts are not only binding sources of law but they are also subject to an hierarchical

5 R. v. Keyn, (1876) 2 Ex. D. 63.

6 As a matter of British law, jurisdiction over British territorial waters was settled by the Territorial Water Jurisdiction Act, 1978, which effectively reversed the decision in R. v. Keyn.

structure of judicial authority, related to the status of the court making the decision. The basic principle is that decisions of superior courts are binding in later similar cases on inferior courts. If the precedents are irreconcilable then the relevant decision of the highest court is regarded as binding. The significance of these rules of precedent for the application of customary rules of international law by English courts is that the rules actually applied by our courts are potentially influenced by the nature of the existing precedents. Thus in principle if there was a decision of our highest court, the House of Lords, on a rule of customary international law say 40 years ago lower courts would regard themselves as bound by that decision and would tend to regard it as continuing authority for the nature and content of that customary rule. This has led to a debate both in our courts and among scholars as to the precise method by which customary rules of international law become part of the law of the United Kingdom⁷. The traditional view is that this takes place by incorporation. That is to say, that the rules of customary law as formed and settled by international practice will be given direct effect by our courts. The rival view is that in view of our doctrine of precedent customary rules must be first transformed into British law by being acknowledged by our courts. By this doctrine of transformation our courts would in effect be claiming a law-finding and law-making role as far as customary rules of international law are concerned. Given satisfactory evidence of such rules no great problem will arise. But if the transformation doctrine is applied it may be difficult for our courts to acknowledge recent changes and developments in a customary rule if there is already a binding British precedent on an earlier version of that rule.

Fortunately, the traditional incorporation doctrine was vigorously reaffirmed by the English Court of Appeal just over ten years ago and that decision is now generally regarded as representing British practice⁸. The basic facts of that case were as follows: the Central Bank of Nigeria

⁷ See, for example, Shaw, *International Law* (2nd ed., 1986) p. 102 et seq., and Starke, *Introduction to International Law* (9th ed., 1984), p. 73 et seq.

⁸ Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria (1977), Q.B. 529.

had issued a letter of credit to a Swiss company for the price of building materials which were to be sold to an English company for supply to the Nigerian Government in connection with a building project in Nigeria. The Nigerian Government had ordered hugely excessive quantities of building material and so as a way out of a difficult situation it ordered the Bank not to honour the letter of credit. The Swiss company then brought an action against the Bank in an English court and the Bank claimed sovereign immunity from the action. Now while the English court acknowledged that a doctrine of sovereign immunity was part of international law, it was conscious that the nature of that doctrine had been changing. The old rule of absolute immunity had been replaced by a new rule of restrictive immunity so that, in simple terms, immunity is accorded to governmental acts of a state, acts jure imperii, but not to commercial acts of a state, acts jure gestionis. The existing English precedents supported the absolute rule. Were English courts in 1977 bound by those precedents or could they acknowledge and apply the new restrictive rule? The incorporation doctrine would enable them to apply the new rule; the transformation doctrine would oblige them to apply the old rule. Lord Denning, who gave a leading judgment in the case said: "As between these two schools of thought, I now believe that the doctrine of incorporation is correct. Otherwise I do not see that our courts could ever recognise a change in the rules of international law. ... Seeing that the rules of international law have changed - and do change - ... it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court, as to what was the ruling of international law 50 or 60 years ago, is not binding on this court today. International law knows no rule of stare decisis."

Finally, in connection with customary rules of international law in British courts, we must consider the possible impact of the doctrine of the legislative supremacy of the British Parliament. Since our Parliament is subject to no legal limits as to the type of law it can make and since Acts of Parliament are a supreme source of law and will prevail over rules of common law which conflict with them, our Parliament clearly has the

capacity to legislate contrary to customary rules of international law. But, from a practical point of view, the risk of the British Parliament legislating in this way is very small indeed. There are two reasons for this. First, although our Parliament has legally unfettered powers it does not generally exercise those powers in an unreasonable way. Our Parliament does not legislate that all blue-eyed babies must be drowned at birth nor that it is unlawful for Frenchmen to smoke in the streets of Paris. Legally it could do these things, but extra-legal constraints such as public opinion, morality, good sense, practicality and international comity operate to prevent it from happening. Therefore there is no tendency for the British Parliament to legislate in conflict with the rules of international law. This safeguard is further reinforced by an important rule of statutory interpretation. If there appears to be a conflict between a rule in a British Act of Parliament and a rule of customary law, the Act is always interpreted in favour of the customary rule unless an express intention to the contrary appears from the Act. We therefore operate a presumption that our Parliament does not intend to legislate contrary to international law, but that presumption may be rebutted by an express intention that Parliament did indeed mean to do that⁹. The combined operation of a legislative policy in favour of international law and a presumption of interpretation against an intention to legislate against international law has resulted in very few instances of our courts holding that Parliament did expressly intend to legislate in that way. I only know of two such cases in the United Kingdom: one Scottish in 1906¹⁰; and one English in 1962¹¹. The Scottish case upheld the conviction of the master of a Norwegian ship for fishing outside British territorial waters; a British Act, in conflict with customary international law, made it an offence and the court held that it was bound to apply the Act. The English case refused to uphold the established rules of international law against double-taxation in a situation in which a British Act had unambiguously legislated contrary to them.

9 See Theophile v. Solicitor General, (1950) A.C. 186, at pp. 195, 196.

10 Mortensen v. Peters, (1906) 8 F.(J.) 93.

11 Collco Dealings Ltd. v. Inland Revenue Commissioners, (1962) A.C. 1.

3. Treaty rules

British practice with regard to treaty rules of public international law is that such rules can have no legal force in the United Kingdom unless they have been expressly given effect by an Act of the British Parliament. Unlike the practice with regard to customary rules, this practice is based on constitutional principles concerning the respective roles of Government and Parliament, an aspect of the doctrine of the separation of powers. In Britain matters of state concerned with foreign policy and relations with foreign states, such as treaty-making and declarations of war and peace, have always been the concern of the Government and not of Parliament. Parliament, for its part, has always been jealous of its exclusive legislative power and resisted any attempt by the Government to legislate without reference to Parliament. Therefore, if treaties made by the Government were to apply directly as a source of law in Britain that would give the Government legislative power independent of that of Parliament which would be constitutionally unacceptable. The long established practice concerning treaties in Britain is that the Government has the authority to accept a treaty and make it binding on the United Kingdom under the rules of public international law, but that the terms of a treaty will not form part of British law and will not be enforceable in British courts unless those terms have been expressly adopted into British law by an Act of Parliament¹².

An illustration of the operation of these principles is provided by a case which arose out of a dispute between the United Kingdom and Italy¹³. The King of Italy had died in exile in 1947 and his private fortune had been transferred to a British Bank as the administrator of his estate. Italy claimed that it was entitled to this fortune under the terms of a Financial Agreement which had been made with the United Kingdom whereby Italian assets in the United Kingdom were to be made available to the Italian Government for the payment of its debts in the United Kingdom.

12 See Attorney-General for Canada v. Attorney-General for Ontario, (1937) A.C. 326.

13 Republic of Italy v. Hambro's Bank Ltd. (1950) Ch. 314.

The Bank refused to hand the fortune over to Italy and so an action was brought against the Bank in an English court. The judge held that since the terms of the Financial Agreement had not been incorporated into English law by Parliament no action based on that Agreement would lie in the English courts.

But that type of case is a rare and highly unusual one. The United Kingdom is generally scrupulous in ensuring that its international treaty obligations are enforceable in British courts to the extent that this is required by the particular treaty. Thus at fairly regular intervals the Government places before Parliament legislation designed to incorporate and make enforceable in British law treaty provisions which intend to confer rights or impose obligations on British subjects. To take 1964 as a year at random, in that year Acts passed by the British Parliament included:

- the Continental Shelf Act which gave effect to provisions of the Geneva Convention on the High Seas of 1958 concerning the exploration and exploitation of the sea bed beyond the limit of territorial waters; and
- the British Nationality Act which amended British law in the light of the U.N. Convention on the Reduction of Statelessness so as to ensure that persons who might otherwise be stateless may, subject to certain conditions, acquire British nationality.

With regard to treaties which are designed to have a direct and unavoidable impact on the municipal law of the signatory states, clearly such treaties cannot be finally accepted as binding as a signatory under international law until steps have been taken to ensure their domestic enforceability. Otherwise a state would be accepting treaty obligations without being able to honour them. In such cases it is the practice of the United Kingdom Government to request Parliament to enact the necessary implementing legislation in advance of the Government finally ratifying the treaty. Britain's accession to the European Community provides a good example of this. It was clear from the outset of the negotiations for British membership that one of the central conditions

of membership was that Community law should be fully implemented and enforced within the legal order of the United Kingdom. The United Kingdom could not therefore bind itself internationally to the Community Treaties unless it was already in a position to satisfy that condition. The sequence of events leading to British membership on 1st January 1973 was therefore as follows:

- (i) Negotiation of the terms of membership by the British Government which were concluded by the end of 1971;
- (ii) Acceptance by Parliament of the principle of membership on the terms negotiated late in 1971;
- (iii) Signature of the Treaty of Accession by the British Government on 22nd January 1972;
- (iv) Passing of the European Communities Act by the British Parliament on 17th October 1972 enabling Community law to be enforced in the United Kingdom;
- (v) Ratification of the Treaty of Accession by the British Government by 31st December 1972;
- (vi) British membership commenced on 1st January 1973.

Finally there are potential problems with regard to the domestic implementation of treaties in the United Kingdom arising out of the legislative supremacy of our Parliament and the interpretative role of the courts. Since a treaty only has the force of law in the United Kingdom through the agency of an Act of Parliament, there is nothing in theory to prevent such Act being repealed or amended by a later Act. In practice such an action is highly unlikely as long as the United Kingdom remains a party to the particular treaty. British Governments through their majority in the House of Commons effectively control the making of legislation by Parliament and in normal circumstances are not likely to permit legislation contrary to the United Kingdom's international obligations¹⁴. The legislative supremacy of the British Parliament

14 See Bridge, "Abstract Law and Political Reality in the Post-European-Accession British Constitution", (1987) Denning Law Journal 23.

therefore represents no real threat to the domestic implementation of treaties. Secondly, there is the interpretative role of the courts: What do British courts do if there is some ambiguity of meaning either between a treaty and an Act passed to implement it or between that Act and a later Act? In the first situation it is commonly recognised by British courts that the implementing statute should be interpreted in the light of the treaty which it is intended to implement. For example, in a case decided in 1981 an English court was required to apply the British Carriage by Air Act 1961 which was enacted to give the force of law in the United Kingdom to the Warsaw Convention on Air Transport of 1929¹⁵. An issue before the court was whether the Convention concerned itself with liability for injury to goods or whether it also extended to loss of goods. There were two authentic texts of the Convention in English and French: the English text used the word "damage" in this context; the French text the word "avarie". In resolving this question of interpretation to include both types of harm the court looked not only at those two words in the two texts but also at the travaux préparatoires of the Convention. A common sense approach is therefore adopted in such situations: the British courts, for purposes of interpretation, will have regard to any evidence which those drafting the treaty had thought would be available to clear up any possible ambiguities or obscurities. As for any conflict between a treaty-implementing Act and a later Act, the presumption that Parliament does not intend to legislate contrary to international law, to which I have already referred, would be applicable in such a situation.

4. Conclusion

Lastly, by way of conclusion, what are the answers to the practical questions which I posed earlier?

Customary rules of international law are fully and automatically applied by British courts subject to occasional practical problems concerning insufficiency of evidence of such rules.

15 Fothergill v. Monarch Airlines (1981), A.C. 251.

Treaty rules of international law are applied by British courts only to the extent that they have been specifically adopted by Act of Parliament but there is a general practice for the necessary legislation to be made.

British law can give no formal guarantee that rules of international law, whether customary or in treaties, will be given precedence over conflicting rules of municipal law. But, unintended conflicts are resolved in favour of international law by means of the presumption that Parliament does not intend to legislate contrary to international law. The likelihood of the British Parliament legislating deliberately and expressly contrary to international law is remote in view of a consistent legislative policy in support of international obligations and the central role which the British Government plays in both foreign affairs and in managing the legislative business of the British Parliament.

Despite the absence of any constitutional guarantees it is submitted that in practice there is a high degree of concordance and harmony between British law and public international law.